APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

Appeal 3-57

(Decided July [illegible], 1958)

THE KIOWA, COMANCHE AND APACHE TRIBES OF INDIANS

v.

THE UNITED STATES

Mr. W. Braxton Miller, with whom was *Mr. Assistant Attorney General Perry W. Morton*, for appellant, *The United States*. *Mr. Ralph A. Barney* was on the briefs.

Mr. J. Roy Thompson, Jr. for cross appellant, *The Kiowa, Comanche and Apache Tribes of Indians*. *Messrs. W. C. Lewis* and *Frank Miskovsky* were on the brief.

ON APPEALS FROM THE INDIAN CLAIMS COMMISSION

LITTLETON, *Judge*, delivered the opinion of the court:

This is an appeal by the United States from a final determination of the Indian Claims Commission in Docket No. 32, dated March 12, 1957, as amended, on July 18, 1957, in which the Commission, after making findings of fact and rendering an opinion, held that the United States was liable to the petitioners for the difference between the value of certain land and the price paid to petitioners therefor. The Government takes the position that the Commission erred as a matter of law in finding that the United States was liable to the petitioners under the circumstances of this case; that the Commission's findings of fact on the issue of value are either inadequate or not supported by substantial evidence on the record as a whole; and that the Commission erred

as a matter of fact and law in disallowing all offsets claimed by the United States.

The Kiowa, Comanche and Apache Tribes of Indians, petitioners below, have filed a notice of cross appeal urging that the Commission erred in finding too low a value per acre for the land acquired by the United States in 1900, and that the Commission erred as a matter of law when it did not allow interest from June 6, 1900, on its award of $2,067,166.

In order to avoid confusion in discussing the contentions of the parties to the cross appeals herein, we shall identify them as the Government and the Indians, respectively.

The original decision on the question of the Government's liability to the Indians in this case was rendered by the Indian Claims Commission on April 9, 1951 (1 Ind. Cl. Comm. 520, 528). The claim was asserted under Section 2 of the Indian Claims Commission Act, 60 Stat. 1049, on the ground that it was a claim which would arise if the so-called Jerome Agreement (authorized by Section 14 of the Act of March 2, 1889, 25 Stat. 890) were revised on the grounds of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or, in the alternative, that it is a claim based upon fair and honorable dealings. In its original findings and decision on the issue of liability, the Indian Claims Commission concluded that it did not need to determine whether or not the Jerome Agreement was obtained by fraud, duress, mistake, or was based upon unconscionable consideration because, in the opinion of the Commission, under ordinary principles of contract law the United States became liable to respond in damages for breach of its contract with the Indians. Although the reasoning of the Commission on this point appears to be somewhat obscure in view of the fact that under the circumstances as outlined by the Commission there appears to have been no contract executed by the parties, we are

of the opinion that the Commission has reached the correct result either because the Government was liable under a contract implied in fact (there having been no valid ratification by Congress of the 1892 Jerome Agreement), or because its conduct in connection with this matter did not comport with fair and honorable dealings.

Under the Treaty of October 21, 1867, 15 Stat. 581, 582, the United States ceded certain lands located in the state of Oklahoma to the Confederated Tribes of Kiowa and Comanche Indians described therein as follows:

> commencing at a point where the Washita river crosses the 98th meridian, west from Greenwich; thence up the Washita river, in the middle of the main channel thereof, to a point thirty miles, by river, west of Fort Cobb, as now established; thence, due west to the north fork of Red river, provided said line strikes said river east of the one hundredth meridian of west longitude; if not, then only to said meridian line, and thence south, on said meridian line, to the said north fork of Red river; thence down said north fork, in the middle of the main channel thereof, from the point where it may be first intersected by the lines above described, to the main Red river; thence down said river, in the middle of the main channel thereof to its intersection with the ninety-eighth meridian of longitude west from Greenwich; thence north, on said meridian line, to the place of beginning, * * *

By a separate treaty the Apache Tribe of Indians was incorporated with the Kiowa and Comanche Tribes of Indians and became entitled to share in the benefits of the above described Reservation, 15 Stat. 589. Article XII of the Treaty of October 21, 1867, *supra*, (known as the Medicine Lodge Treaty) provided as follows:

> No treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or force as against the said Indians, unless executed and signed by at least three fourths of all the adult male Indians occupying

the same, and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him as provided in Article III [VI] of this treaty.

Pursuant to section 14 of the Act of March 2, 1889, 25 Stat. 980, the President of the United States appointed a Commission comprised of David H. Jerome, as Chairman, Warren G. Sayre, and Alfred M. Wilson, to negotiate an agreement with the Indians for the cession of their land described in the 1867 Treaty. The Commissioners ultimately negotiated such an agreement on the 6th day of October 1892, which agreement became known as the Jerome Agreement. The Agreement contained a provision that it would become effective *only* when ratified by the Congress of the United States. On October 22, 1892, the United States Commissioners transmitted the Agreement to the President, who in turn reported the Agreement to the Congress. There was apparently a good deal of dissatisfaction among the members of the Indian tribes with respect to the terms of the Agreement and the manner of its procurement, which dissatisfaction was communicated to officials in Washington from time to time. Congress took no action with respect to the Jerome Agreement until it passed the Act of June 6, 1900, 31 Stat. 672, 676. That Act was entitled "An Act to ratify an Agreement with the Indians of the Fort Hall Indian Reservation in Idaho, and making appropriations to carry the same into effect." Section VI of that Act purported to quote verbatim and to ratify the Jerome Agreement made with the Kiowa, Comanche and Apache Indians in 1892. However, the so-called ratification contained in the Act of June 6, 1900,[1] made a number of changes

[1] The terms of the ratifying legislation were further changed by the Act of January 4, 1901, 31 Stat. 727, the Act of March 3, 1901, 31 Stat. 1078 and the Act of March 3, 1901, 31 Stat. 1093 in which Congress, among other things, extended the time for making allotments and the opening of the surplus land to settlement.

in the terms agreed to by the Indians and the Commissioners in the Jerome Agreement and such changes were never resubmitted to the Indians for acceptance or rejection as required by Article XII of the Treaty of October 21, 1867, quoted above. One of the changes made in 1900 concerned the classification of lands. The Jerome Agreement had provided that the land in the reservation should be classified as grain-growing land or as grazing land and that in making selection of the lands to be allotted in severalty, as provided elsewhere in the Agreement, each Indian should be required to take at least one-half of his or her allottment in land classified as grazing land. This provision was eliminated from the 1900 ratification and in its place Congress provided that the Secretary of the Interior should set aside for the use in common of the tribes 480,000 acres of grazing land to be selected by the Secretary of the Interior either in one or more tracts as should best subserve the interests of the Indians. As pointed out by the Indians, they were entitled under the Jerome Agreement to have their lands classified into grain-growing and grazing lands as an aid in making their selections. Whether, as contended by the Government, the change made in 1900 ultimately worked to the benefit of the Indians, or whether it did not, the fact remains that the ratification of the Jerome Agreement was not in the terms of the original Agreement agreed to by the Indians and the United States Commissioners.

The Jerome Agreement also provided that the Indians were to receive $2,000,000 for their surplus lands to be paid for as follows: $200,000 in cash to be distributed per capita within 120 days after ratification of the Agreement; $200,000 to be paid under direction of the Secretary of the Interior, one year after the first payment; $100,000 to be paid one year following the second payment; interest at the rate of 5 percent on the remaining $1,500,000 was to be paid to the Indians per capita annually. In the 1900 ratification of the Jerome Agreement Congress provided that

$500,000 was to be distributed per capita at such times and in such manner as the Secretary of the Interior should deem to be for the best interests of the Indians. The 1900 legislation then provided that interest on the remaining $1,500,000 was to be paid to the Indians per capita annually only in the event that the Indians were successful in defending a lawsuit which Congress had authorized the Choctaw and Chickasaw Nations to bring in the Court of Claims to determine the rights of such Nations to a reversionary interest in the unallotted lands.

The Act of 1900 eliminated the name of the Indian agent and that of an Army officer which the Indians and the United States had agreed under the Jerome Agreement should be beneficiaries of that Agreement.

The Jerome Agreement had provided that sections 16 and 36 in each township should be withheld from allottment. The Act of 1900 provided that sections 13 and 33 of each township on the reservation should be withheld from allotment in addition to sections 16 and 36. Thus the 1900 legislation doubled the amount of land withheld from allottment. Although under the 1900 legislation individual Indians would still receive the amount of land as individual allotments guaranteed to them by the Jerome Agreement, the withholding of the additional sections from allottment might well have prevented family units from making selections of contiguous lands.

The 1900 legislation also provided that if the allotted lands contained minerals they should be open to location and entry under the mining laws of the United States. Despite the fact that this provision was never enforced, its inclusion in the 1900 legislation represented a material change in the Jerome Agreement.

We are of the opinion that the Indian Claims Commission was correct in ruling that Congress did not actually ratify the Jerome Agreement, which was in essence a contract

between the Indians and the United States, because it was accepted in terms varying materially from the offer. The Government urges that the Indians are estopped from making such an argument because for years subsequent to the passage of the 1900 legislation the Indians *elected* to live within the terms of the 1900 law. As a matter of fact, the Indians did everything they could to escape the terms of the 1900 legislation. See *Lone Wolf* v. *Hitchcock*, 187 U. S. 553. As this court pointed out in *Sioux Tribe* v. *United States*, 125 C. Cls. 439, 443, the doctrine of acquiescence is hardly applicable to a dependent Indian tribe. *C. A. Moore, Survivor* v. *United States*, 32 C. Cls. 593, relied on by the United States, is distinguishable in that the Sioux Tribe in that case consented to the changes made by the Congress, and, along with the United States, regarded the unproclaimed treaty as being in effect. Furthermore, the *Moore* case was concerned with the rights of a white citizen of the United States to collect for an Indian depredation alleged to have been committed by the Sioux Tribe, and the court held that under the circumstances of that case the *United States* could not complain that the treaty was ineffective merely because it had not been proclaimed.

The Commission held that the Indians herein are entitled to recover the difference between the value of the land acquired by the United States on June 5, 1900, and the purchase price paid therefor on that date. We are of the opinion that the Commission was correct in so holding either on the ground that the Indians are entitled to the fair market value of the land as damages for breach of a contract implied in fact, or as a measure of their recovery on the grounds of fair and honorable dealings. It would be helpful to the court, and perhaps to the parties, if the Commission would phrase its holdings on liability in the terms of section 2 of the Indian Claims Commission Act.

On the question of the amount of recovery, the Commission found that the land acquired by the United States in

1900 was worth on an average $2 per acre, whereas the Indians were paid approximately 98.3 cents per acre. In their cross appeal the Indians urged that the evidence of record would support a valuation of $3.45 per acre, but the Indians concede that they are unable to show that the Commission's finding of $2 per acre is not supported by substantial evidence. The Government, on the other hand, urges that the Commission's findings are not supported by substantial evidence on the record as a whole and that the findings are not sufficiently basic and detailed to meet the tests laid down by this court in *Snake or Piute Indians* v. *United States*, 125 C. Cls. 241.

The record on valuation in the instant case is voluminous and represents careful and exhaustive preparation by the Indians and by the Government. Following the criteria suggested by this court in its decisions in *Roque River Tribe of Indians* v. *United States*, 116 C. Cls. 454, cert. den. 341 U. S. 902 and in *Alcea Band of Tillamooks, et al.* v. *United States*, 115 C. Cls. 463, reversed on the matter of interest only, *United States v. Alcea Band, etc.* 341 U. S. 48, the Indians Claims Commission appears to have carefully analyzed the record on valuation and made sufficiently detailed primary findings to adequately reflect that record and to fully support the ultimate finding of $2 an acre for the land in question. We are of the opinion that the findings on valuation are an adequate and accurate reflection of the evidence produced by the parties; that the burden of selecting from the conflicting evidence material upon which to base findings of fact has been admirably borne by the Commission and that its findings are supported by substantial evidence on the record as a whole and are therefore binding upon this court. The primary objection which the Government appears to have to the Commission's findings is that the Commission relied on some portions of the evidence rather than upon others. The choice which the Commission must make in a case such as this is not a simple one, but

we are of the opinion that the choice it has made in each instance was the proper one.

On the matter of offsets the Commission finally concluded that the Government had not succeeded in establishing any allowable offsets. The evidence submitted by the Government in support of its claim of offsets consisted of the usual voluminous report of the General Accounting Office. In accordance with the expressions of this court in *Quapaw Tribe, et al.* v. *United States*, 128 C. Cls. 45, the Indian Claims Commission has made a careful analysis of the reports of the General Accounting Office and has concluded, with respect to some of the offsets, that the United States had failed to sustain the burden of proof necessary to show that the expenditures actually were made for the benefit of the tribe. In other instances, the Commission has held that the amounts expended were for the benefit of individual Indians rather than for the benefit of the tribe and were therefore not allowable as offsets against a judgment for the tribe on a tribal claim. Although the Government argues that the Commission was supplied with a second report from the General Accounting Office purportedly devised to supply facts held by this court to be essential in the *Quapaw* case *supra*, the Report is not conclusive and the issue of whether or not such facts have been supplied as would support the allowance of an offset, is a matter for the judicial determination of the Indian Claims Commission. The Commission has made numerous detailed findings relative to the proof of offsets. Those findings adequately reflect the record on this matter and are supported by substantial evidence. In its opinion of March 12, 1957 (5 In. Cl. Comm. 96), the Commission has carefully considered each item of offset claimed and, in our opinion, has correctly ruled against the allowance of any of the offsets.

On the matter of interest, the Indians urge that the Commission erred in not allowing interest as a part of the

award. The Indians contend that although Congress had the power to take the surplus lands in question, Congress did not have the power to pay the Indians less than just compensation for the land which it took. The Indians concede that under the holding of the Supreme Court in *Lone Wolf* v. *Hitchcock*, *supra*, the acquisition by the United States of the land in question did not amount to a taking in the constitutional sense because of the plenary power of Congress over tribal relations of the Indians and over Indian tribal property. The Court held that the Act of June 6, 1900 was merely the exercise of such Congressional plenary power. While, as pointed out by the Indians, it is difficult to distinguish between an act of Congress which passes title to Indian land without the consent of the tribal owners and for no consideration, and an act of Congress which passes title to Indian land without the consent of the owners for only a portion of its true value at the time of acquisition, we think that the issue regarding the allowability of interest is not actually before the court in this appeal. The petition of the Indians before the Indian Claims Commission does not state a claim arising under the Constitution, but rather a claim which would result if the Jerome Agreement were revised on the grounds of fraud, duress, unconscionable consideration, mutual or unilateral mistake; and a claim based upon fair and honorable dealings. This court has held that awards rendered on claims arising under those portions of section 2 of the Indian Claims Commission Act do not bear interest. *The Osage Nation of Indians* v. *United States*, 119 C. Cls. 592, 671. The same is true of a claim under a contract which falls under that portion of section 2 of the Act providing for "all other claims in law or equity * * * with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; * * * ".

The final determination and award of the Indian Claims Commission in favor of the Indians, petitioners below, is affirmed.

It is so ordered.

LARAMORE, *Judge*; MADDEN, *Judge*; WHITAKER, *Judge*; and JONES, *Chief Judge*, concur.

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

Appeal 3-57

(Decided October 8, 1958)

THE UNITED STATES

v.

THE KIOWA, COMANCHE AND APACHE TRIBES OF INDIANS

Mr. W. Braxton Miller, with whom was *Mr. Assistant Attorney General Perry W. Morton*, for appellant, *The United States*. *Mr. Ralph A. Barney* was on the briefs.

Mr. J. Roy Thompson, Jr. for cross appellant, *The Kiowa, Comanche and Apache Tribes of Indians*. *Messrs. W. C. Lewis* and *Frank Miskovsky* were on the brief.

ON MOTION OF THE UNITED STATES FOR REHEARING

PER CURIAM: The appellant, the United States, has moved for reconsideration in connection with three points relative to the court's opinion of July 16, 1958, in the matter of offsets.

As its first ground, the United States urges that the 1,104 depredations judgments paid out of the United States Treasury were proper offsets from the judgment rendered

by the Indian Claims Commission in favor of the Tribes, that the Commission erred in denying such payments as offsets, and that the court erred in affirming the decision of the Commission on this point.

The Indian Claims Commission Act makes the following provision with respect to the allowance of offsets:

> In determining the quantum of relief the Commission shall make appropriate deductions for all payments made by the United States on the claim, and for all other offsets, counterclaims, and demands that would be allowable in a suit brought in the Court of Claims under section 145 of the Judicial Code (36 Stat. 1136; 28 U. S. C. sec. 250), as amended; the Commission may also inquire into and consider all money or property given to or funds expended gratuitously for the benefit of the claimant and if it finds that the nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action, may set off all or part of such expenditures against any award made to the claimant, except that it is hereby declared to be the policy of Congress that monies spent for the removal of the claimant from one place to another at the request of the United States, or for agency or other administrative, educational, health or highway purposes, or for expenditures made prior to the date of the law, treaty or Executive Order under which the claim arose, or for expenditures made pursuant to the Act of June 18, 1934 (48 Stat. 984), save expenditures made under section 5 of that Act, or for expenditures under any emergency appropriation or allotment made subsequent to March 4, 1933, and generally applicable throughout the United States for relief in stricken agricultural area, relief from distress caused by unemployment and conditions resulting therefrom, the prosecution of public work and public projects for the relief of unemployment or to increase employment, and for work relief (including the Civil Works Program) shall not be a proper offset against any award.

The depredations judgments in question were judgments rendered by this court pursuant to the Act of March 3, 1891,

26 Stat. 851, which conferred jurisdiction on this court to inquire into and determine finally all claims for property of United States citizens taken or destroyed by Indians without cause and not returned or paid for. Section 6 of the Act of March 3, 1891, made the following provisions for the payment of any judgment so rendered:

> That the amount of any judgment so rendered against any tribe of Indians shall be charged against the tribe by which, or by members of which the court shall find that the depredation was committed, and shall be deducted and paid in the following manner: First, from annuities due said tribe from the United States; second, if no annuities are due or available, then from any other funds due said tribe from the United States, arising from the sale of their lands or otherwise; third: if no such funds are due or available, then from any appropriation for the benefit of said tribe, other than appropriations for their current and necessary support, subsistence and education; and, fourth, if no such annuity, fund, or appropriation is due or available, then the amount of the judgment shall be paid from the Treasury of the United States: *Provided*, That any amount so paid from the Treasury of the United States shall remain a charge against such tribe, and shall be deducted from any annuity, fund or appropriation hereinbefore designated which may hereafter become due from the United States to such tribe.

All of the judgments in question were paid pursuant to the fourth alternative of section 6, i.e., from the Treasury of the United States, and it is the Government's contention that under the proviso of section 6 the amounts so paid are a charge against the Tribe and therefore are legal offsets to be deducted from the present judgment as a "fund" which has become "due from the United States to such Tribe."

In the Act of June 6, 1900, 31 Stat. 672, the land which was the subject of the instant claim before the Indian Claims Commission was ceded to the United States for the sum of $2,000,000, plus interest thereon. That Act provided that none of the money or interest thereon "which is, by the

terms of the said agreement, to be paid to said Indians shall be applied to the payment of any judgment that has or may hereinafter be rendered under the provisions of the Act of 1891, *supra*.

Under the provisions of 25 U. S. C. 126 (Act of July 15, 1871, 16 Stat. 335, 360, R. S. § 2098), no claim for Indian depredations could be paid until Congress should make a special appropriation therefor. Accordingly, each annual appropriation act (with one exception), commencing with the Act of July 28, 1892, 27 Stat. 282, 319, contained a provision for the payment of the depredation judgments in language substantially as follows:

> For payment of judgments of the Court of Claims in Indian depredation cases, * * * or so much thereof as may be necessary to pay and discharge such judgments as have been rendered against the United States after the deductions required to be made under the provisions of section six of the act approved March third, eighteen hundred and ninety-one, entitled "An act to provide for the adjustment and payment of claims arising from Indian depredations," shall have been ascertained and duly certified by the Secretary of the Interior to the Secretary of the Treasury, which certification shall be made as soon as practicable after the passage of this act, and such deductions shall be made according to the discretion of Secretary of the Interior, having due regard to the educational and other necessary requirements of the tribe or tribes affected and the amounts paid shall be reimbursed to the United States at such times, and in such proportions, as the Secretary of the Interior may decide to be for the interests of the Indian service.

The one exception mentioned above was the Act of August 26, 1912, 37 Stat. 595, 617-618, and in that Act Congress did not give the Secretary of the Interior discretion as to whether or not the United States would be reimbursed for this depredation judgment paid out of the Treasury of the United States.

In the years following the Act of March 3, 1891, the Secretary of the Interior exercised the first discretion placed in him by that act and certified that there were no funds of the Tribe available for payment of depredations "due regard being had to their educational and other necessary requirements." The Secretary also exercised the further discretion conferred upon him by the subsequent appropriation acts (except for the year 1912) and decided that it was not in the "interests of the Indian service" to reimburse the United States for the depredation judgments which had been paid out of the Treasury of the United States. In the fiscal year 1912 a depredation judgment in the sum of $719 was paid by the United States and in the appropriation act authorizing such payment the Secretary was not specifically given discretion to withhold reimbursement in "the interests of the Indian service."

The Indian Claims Commission decided that the depredation judgments paid out of the Treasury of the United States were not legal offsets because; although by the 1891 Act they were made a charge against the Tribe to be deducted from any sum becoming due from the United States to the Tribe, Congress had vested sole discretion in the Secretary of the Interior to determine whether or not such reimbursement should be made from tribal funds out of annual appropriations for such purposes. It was the opinion of the Commission that the depredation judgments were not legal offsets and that the Commission had no jurisdiction to review the actions of the Secretary taken in the exercise of his discretion. With respect to the $719 paid by the United States in 1912, the Commission ruled that this payment did not constitute a legal offset because, under the Act of June 6, 1900, supra, money paid to the Indians for the land ceded under that Act could not and should not be used for the payment of depredations judgments. The Commission suggested that this same ground would apply equally to all depredation judgments which had been paid by the United States.

We are of the opinion that the Commission was correct in holding that the reimbursement of the United States from tribal funds for payment of the Indian depredation judgments was a matter committed by Congress to the sole discretion of the Secretary of the Interior and that he had exercised his discretion as to all but one such judgment. We are further of the opinion that as to all but the 1912 depredation judgment appropriations, the issue of reimbursement is closed.

With respect to the payment of the $719 in 1912, the Secretary lacked discretion to withhold reimbursement in the "interests of the Indian Service" and unless the judgment in this case can be said to be money which by the terms of the 1900 agreement was to be paid to the Indians, that $719 would, under the proviso of section 6 of the 1891 Act, be a charge against the Tribe and therefore a proper offset. We think it is not such a proper offset.

The claim in this case is one arising under section 2 of the Indian Claims Commission Act, i.e., a claim resulting where the agreement of 1900 between the Indians and the United States is revised on the ground of unconscionable consideration. While it is clear that in the 1900 Act Congress may have been speaking about the $2,000,000, plus interest which the Indians would receive for their land when it spoke about the "money or interest thereon which is, by the terms of said agreement, to be paid to such Indians," we are of the opinion that the judgment in this case *is* money which is to be paid to the Indians pursuant to the 1900 agreement revised on the ground that the consideration provided for therein was unconscionable; otherwise there would be no basis for the claim. Accordingly, we hold that none of the depredation judgments paid by the United States and not reimbursed by the Secretary of the Interior, are legal offsets applicable to the judgment of the Commission in this case.

The United States further asks for a reconsideration on the matter of the allowability as an offset of cash payments to individual indigent Indians. The Commission held that payments to individual Indians were not proper offsets against a judgment in favor of the tribe and this court affirmed that holding. Defendant points to the fact that in our decision in *Quapaw Tribe* v. *United States*, 128 C. Cls. 45, the court held that the payment of board and funeral expenses of indigent Indians was a proper offset. In the same decision, however, this court held that presents to individual Indians did not constitute proper offsets against a judgment rendered on a tribal claim. Obviously, the two rulings were inconsistent and this inconsistency was discovered and briefed to the Commission in the course of the trial of the instant case. The Commission rightly determined to follow our ruling with respect to presents to individual Indians, and we affirmed that determination. To the extent that our holding is in conflict with our ruling in the *Quapaw* case respecting board and funeral expenses to individual Indians, that holding is overruled.

Finally, the United States contends that the Commission erred in refusing to apply the practice of prorating expenditures for the joint benefit of all the tribes under a single agency. Inasmuch as no offsetable items have been established by the United States in this case, there is no need for the court to pass on the issue of proration.

For the reasons set forth above, the motion of the United States for reconsideration is denied.

It is so ordered.

APPENDIX C

Sections 2 and 20 of the Act of August 13, 1946, 60 Stat. 1049, 25 U.S.C. 70a, 70s, creating the Indian Claims Commission, are in pertinent part as follows:

§ 70a. Jurisdiction; claims considered; offsets and counterclaims.

The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after August 13, 1946, shall be considered by the Commission.

All claims under this chapter may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States. * * *

§ 70s. Review by Court of Claims and Supreme Court.

(a) In considering any claim the Commission at any time may certify to the Court of Claims any definite and distinct questions of law concerning which instructions

are desired for the proper disposition of the claim; and thereupon the Court of Claims may give appropriate instructions on the questions certified and transmit the same to the Commission for its guidance in the further consideration of the claim.

(b) When the final determination of the Commission has been filed with the clerk of said Commission the clerk shall give notice of the filing of such determination to the parties to the proceeding in manner and form as directed by the Commission. At any time within three months from the date of the filing of the determination of the Commission with the clerk either party may appeal from the determination of the Commission to the Court of Claims, which Court shall have exclusive jurisdiction to affirm, modify, or set aside such final determination. On said appeal the Court shall determine whether the findings of fact of the Commission are supported by substantial evidence, in which event they shall be conclusive, and also whether the conclusions of law, including any conclusions respecting "fair and honorable dealings", where applicable, stated by the Commission as a basis for its final determination, are valid and supported by the Commission's findings of fact. In making the foregoing determinations, the Court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. The Court may at any time remand the cause to the Commission for such further proceedings as it may direct, not inconsistent with the foregoing provisions of this section. The Court shall promulgate such rules of practice as it may find necessary to carry out the foregoing provisions of this section.

(c) Determinations of questions of law by the Court of Claims under this section shall be subject to review by the Supreme Court of the United States in the manner prescribed by section 288 of Title 28.